

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.
v.
DEPUTY AREA DIRECTOR, ALBUQUERQUE AREA OFFICE,
BUREAU OF INDIAN AFFAIRS

IBIA 85-34-A

Decided February 25, 1986

Appeal from a decision of the Deputy Albuquerque Area Director approving a resolution of the Pueblo of Acoma that imposed a leasehold tax on non-retail commercial leaseholds within the Pueblo boundaries.

Affirmed.

1. Indians: Taxation--Indians: Tribal Powers: Tribal Sovereignty--
Regulations: Generally

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

2. Bureau of Indian Affairs: Administrative Appeals: Generally--
Constitutional Law: Generally

The Bureau of Indian Affairs and its officials are subject to the limitations imposed on the Federal Government by the United States Constitution.

3. Board of Indian Appeals: Generally--Bureau of Indian Affairs:
Administrative Appeals: Generally--Constitutional Law: Generally

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals.

4. Constitutional Law: Generally--Indians: Taxation

A tax ordinance passed by an Indian tribe does not unduly burden interstate commerce if it applies to an activity with a substantial nexus with the tribe, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the tribe.

5. Administrative Procedure: Burden of Proof--Indians: Taxation

A taxpayer claiming immunity from an Indian tribal tax has the burden of proving entitlement to an exemption.

6. Constitutional Law: Generally--Indians: Civil Rights: Indian Civil Rights Act of 1968--Indians: Tribal Powers: Tribal Sovereignty

Constitutional proscriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

7. Board of Indian Appeals: Jurisdiction--Indians: Civil Rights: Indian Civil Rights Act of 1968--Indians: Tribal Powers: Tribal Sovereignty

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

APPEARANCES: Linda K. Cliffel, Esq., and Ellen L. Falkof, Esq., Chicago, Illinois, for appellant; Peter C. Chestnut, Esq., Albuquerque, New Mexico, for the Pueblo of Acoma. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On May 13, 1985, the Board of Indian Appeals (Board) received the administrative record in this case on referral from the Bureau of Indian

Affairs (BIA) pursuant to 25 CFR 2.19(a)(2). The Atchison, Topeka and Santa Fe Railway Company (appellant) filed an appeal under 25 CFR Part 2 with the Deputy Assistant Secretary-- Indian Affairs (Operations) seeking review of a January 15, 1985, decision issued by the Deputy Albuquerque Area Director (appellee). Appellee's decision approved Resolutions Nos. TC-SEPT-27-84-01-1 and TC-NOV-20-84-18-5, passed by the Pueblo of Acoma (Pueblo), imposing a leasehold tax on non-retail commercial leaseholds within the Pueblo's boundaries. For the reasons discussed below, the Board affirms that decision.

Background

The Pueblo is a federally recognized Indian tribe located in the State of New Mexico. See 50 FR 6057 (Feb. 13, 1985). Although in 1934 it voted to accept the provisions of the Indian Reorganization Act (IRA), June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461-479 (1982), 1/ it maintains its traditional organization and has neither reorganized under the IRA nor adopted a written constitution.

On September 27, 1984, the Acoma Tribal Council adopted Resolution No. TC-SEPT-27-84-01-1, a general revenue-raising tax ordinance providing for the imposition of a tax on non-retail commercial leaseholds within the Pueblo boundaries. The tax was made effective retroactively to September 1, 1984. By letter dated October 25, 1984, the Pueblo requested approval of the resolution by the Albuquerque Area Director, Bureau of Indian Affairs (BIA, Area Director). The Area Director suggested two amendments to the

1/ All citations to the United States Code are to the 1982 edition.

resolution. The first amendment would make the tax effective January 1, 1985; the second would provide a procedure for protesting the valuation placed on leasehold interests and certain other matters. On November 20, 1984, the tribal council adopted Resolution No. TC-NOV-20-84-18-5, which amended Resolution No. TC-SEPT-27-84-01-1 as suggested by BIA. Both resolutions were approved by appellee on January 15, 1985. ^{2/} The approval letter stated that after review by the agency, area office, and Field Solicitor's office, it was "determined that the Ordinance in question [was] a proper exercise of Tribal governmental authority."

Appellant first became aware of the resolution when it received a letter from the Pueblo dated October 16, 1984, and entitled "Notice to Taxpayer." The letter stated that a notice of valuation and tax due would shortly be sent to appellant. By letter dated November 9, 1984, appellant requested from the Superintendent of the Southern Pueblos Agency (Superintendent), BIA, an opportunity to comment on the tax if it had not already been approved by the Secretary. Although the record contains a supplemental notice to taxpayers, dated November 15, 1984, which sets forth the amendments to the original resolution and provides an opportunity to comment, there is no indication that this notice was sent to appellant, or that appellant was given an opportunity to comment. The tax levied upon the railroad by the Pueblo is not under direct review by the Board in this appeal. Appellant's brief on appeal explains that a direct protest against the tax has been filed with the Pueblo (Appellant's Brief at 3). Direct review of the Pueblo's tax

^{2/} The September and November resolutions will be referred to collectively as "the resolution."

scheme itself (as distinguished from Departmental approval of the council's resolution) is beyond the authority of this Board. See 43 CFR 4.1(b)(2).

On February 14, 1985, the area office received notice of appellant's intent to appeal BIA's approval of the tax. Appellant's brief in support of the appeal was received on March 14, 1985. Appellee transmitted the appeal documents and background information to the Deputy Assistant Secretary on March 26, 1985.

On May 8, 1985, the appeal was transferred without decision to the Board in accordance with the provisions of 25 CFR 2.19(a)(2). 3/ Appellant and the Pueblo filed briefs on appeal. Although appellee did not file a brief addressing all of the issues raised, he submitted a statement with respect to one issue.

Discussion and Conclusions

Appellant raises five arguments on appeal. Appellant first contends that BIA approval of the tax must be vacated because it was given in violation of (1) the rulemaking requirements of 5 U.S.C. § 553 and (2) the Due Process Clause of the Fifth Amendment to the United States Constitution. Appellant further asserts that approval was arbitrary, capricious, and unlawful because the tax itself violates (1) the Commerce Clause of Art. I,

3/ Section 2.19(a) states:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [now, Deputy Assistant Secretary--Indian Affairs (Operations)] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision."

§ 8, cl. 3, of the United States Constitution; (2) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and (3) section 306 of the Railroad Revitalization and Regulatory Reform Act (4-R Act), Oct. 17, 1978, 49 U.S.C. § 11503, 92 Stat. 1445, P.L. 95-473.

Initially, the Board notes that the Pueblo has the inherent power to impose taxes. As stated by Interior Solicitor Margold in an opinion dated October 25, 1934:

Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty. [Emphasis in original.]

55 I.D. 14, 19 (1934). Solicitor Margold expressly noted that:

Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

55 I.D. at 46. In support of this statement Solicitor Margold cited

Morris v. Hitchcock, 194 U.S. 384, 392 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906); Maxey v. Wright, 3 Ind. T. 243, 54 S.W. 807, aff'd, 105 F. 1003 (8th Cir. 1900); and 23 Ops. Atty. Gen. 528 (1901).

Tribal power to tax has recently been unequivocally affirmed by the Supreme Court in Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 105 S. Ct. 1900 (1985), and Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). In Merrion the Court discussed an oil and gas severance tax imposed by the Jicarilla Apache Tribe, which is reorganized under a written constitution approved by the Secretary in accordance with the IRA. The Court stated at 455 U.S. 155 that Congress has

provided a series of federal checkpoints that must be cleared before a tribal tax can take effect. Under the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, a tribe must obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax nonmembers. Further, before the ordinance * * * challenged here could take effect, the Tribe was required again to obtain approval from the Secretary. * * *

As we noted earlier, the * * * tax challenged by petitioners was enacted in accordance with this congressional scheme. Both the Tribe's Revised Constitution and the challenged tax ordinance received the requisite approval from the Secretary. This course of events fulfilled the administrative process established by Congress to monitor such exercises of tribal authority. [Footnote omitted.]

In Kerr-McGee the Court affirmed the power of Indian tribes that do not have written constitutions approved by the Secretary to tax leasehold interests in tribal lands held by non-Indians. The Navajo Nation did not accept the provisions of the IRA. After passing two taxing ordinances, it submitted them to BIA for approval. BIA held that Secretarial approval was

not necessary. In holding that Federal approval of tribal taxes was not required by the IRA or any other statute, the Court found that such approval was in most cases required only because of provisions in tribal constitutions, and that those provisions were subject to amendment to remove the approval requirement. The Court declined to impose a duty on the Secretary to approve taxing ordinances when neither Congress nor the tribe had found such approval necessary. After citing earlier cases relating to a tribe's power as a sovereign to tax both members and nonmembers, the Court observed with respect to present Federal Indian policy:

As we noted in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 * * * (1983), the Federal Government is "firmly committed to the goal of promoting tribal self-government." Id., at 334-335. * * * The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs. See President's Statement on Indian Policy, 19 Weekly Comp.Pres.Doc. 98, 99 (Jan. 24, 1983).

Id. at 1904.

In this case, the Pueblo apparently believed that under the Merriam decision its tax resolution needed to be submitted for Secretarial approval. ^{4/} The Area Director, as requested, reviewed the resolution, suggested certain changes, and ultimately approved the resolution after his suggested changes were accepted. Appellant argues that this decision to approve the resolution constituted a rule within the meaning of 5 U.S.C. § 551(4), and was, therefore, subject to the notice and comment procedures of 5 U.S.C. § 553. The

^{4/} Because it is not raised by the parties, the Board expresses no opinion on this interpretation of law.

question is whether appellant is correct that BIA's action in approving a legislative enactment of a dependent, but sovereign Indian tribe, recognized by the United States as having a government-to-government relationship with it and possessing full powers of sovereignty in tax matters, constitutes an agency rule within the meaning of 5 U.S.C. § 551(4).

Section 551(4) defines "rule" as

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

"Rule making" is defined in section 551(5) as the "agency process for formulating, amending, or repealing a rule." The Department of the Interior is an "agency" within the meaning of section 551(l).

While no attempt precisely to define rulemaking can be wholly successful, the essence of its meaning is generally understood. Rulemaking by an agency characteristically involves the promulgation of concrete proposals, declaring generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it.

PBW Stock Exchange, Inc. v. Securities & Exchange Commission, 485 F.2d 718, 732 (3rd Cir. 1973), cert. denied, 416 U.S. 969 (1974). Rulemaking involves the power of an administrative agency to "formula[te] policy and

mak[e] rules to fill any gap left [in a congressionally created and funded program], implicitly or explicitly, by Congress.” Morton v. Ruiz, 415 U.S. 199, 231 (1974). “The Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherent arbitrary nature of unpublished ad hoc determinations.” Ruiz, supra, at 232.

[1] BIA approval, when necessary, of legislation enacted by a sovereign Indian tribe is not an agency rule within the meaning of 5 U.S.C. 551(4). The tribal power to tax is an attribute of tribal sovereignty not a grant of power from the Federal Government. BIA approval of a tribal tax resolution therefore does not constitute the promulgation of policy by a Federal agency to fill the gaps left by Congress in a congressionally created program. Furthermore, and most significantly, throughout the history of its consideration of tribal taxing laws, the Supreme Court has never held that Secretarial approval of such laws constitutes rulemaking. In light of the fact that Federal review of such laws is not required by any statute of the United States, the Board declines to hold that when approval is given, it is subject to 5 U.S.C. § 553. The Board, therefore, rejects appellant's argument that BIA approval of this tax ordinance was subject to the rulemaking provisions of 5 U.S.C. § 553.

Appellant next argues that BIA approval of the resolution violates the Due Process Clause of the Fifth Amendment to the United States Constitution, which states in pertinent part: "No person shall * * * be deprived of life,

liberty, or property, without due process of law." Appellant places primary reliance for its due process argument on Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839 (E.D.Va. 1980), which it states holds that "[a]dministrative agency decisions which are not governed by statutory procedures but which nevertheless affect an individual's rights, obligations or opportunities are required to be issued only after procedural requirements have been followed in accordance with the Due Process Clause of the Fifth Amendment" (Appellant's opening brief at 5).

[2, 3] As a Federal agency, BIA and its officials are indeed subject to the limitations imposed on the Federal Government by the United States Constitution. ^{5/} Appellant is thus correct in its contention that the due process clause of the Fifth Amendment applies to actions and decisions of appellee. However, any due process violation which appellee may have committed in not accepting receipt of appellant's comments prior to issuing the decision appealed has been rendered harmless by the present proceeding. In Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 195, 90 I.D. 243, 249 (1983), this Board held that the requirements of due process could be met through its administrative review proceedings. In the course of the present proceedings, appellant has been given the opportunity to comment on the tax, to have its comments considered on the merits and to have a reasoned decision issued. Any prior due

^{5/} "[A]ctions by Congress and by administrative officials in Indian affairs are subject to judicial review under principles of constitutional and administrative law." Felix S. Cohen's Handbook of Federal Indian Law at 218 (1982 ed.).

process violation of appellant's Fifth Amendment rights has therefore been rendered moot and/or harmless. ^{6/}

Appellant next attacks the constitutionality of the tax itself under the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, which states: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Normally, the Board will not reach an argument alleging the unconstitutionality of a statute because of the limited nature of its administrative jurisdiction. See, e.g., Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983). However, as the Supreme Court noted in Merrion, administrative review of tribal ordinances by the Secretary was intended by Congress to ensure that such tribal legislation does not impermissibly impact upon areas of legitimate Federal concern, such as interstate commerce. The tax in Merrion was imposed by an IRA tribe and approved in accordance with the requirements of that tribe's constitution. The Court stated at 455 U.S. 155-56:

As we noted earlier, the * * * tax challenged by petitioners was enacted in accordance with this congressional scheme [established in the IRA]. Both the tribe's Revised Constitution and the challenged tax ordinance received the requisite approval from the Secretary. This course of events fulfilled the administrative process established by Congress to monitor such exercises of tribal authority. As a result, this tribal tax comes to us in

^{6/} The Board notes the tribe and its official may likewise be subject to the similar due process requirements of the Indian Civil Rights Act, Apr. 11, 1968, P.L. 90-284, 82 Stat. 77, 25 U.S.C. § 1302(8) ("No Indian tribe in exercising powers of self-government shall * * * deprive any person of liberty or property without due process of law"). See discussion, infra relating to the Indian Civil Rights Act.

a posture significantly different from a challenged state tax, which does not need specific federal approval to take effect, and which therefore requires, in the absence of congressional ratification, judicial review to ensure that it does not unduly burden or discriminate against interstate commerce. Judicial review of the Indian tax measure, in contrast, would duplicate the administrative review called for by the congressional scheme.

* * * Congress, of course, retains plenary power to limit tribal taxing authority or to alter the current scheme under which the tribes may impose taxes. However, it is not our function nor our prerogative to strike down a tax that has traveled through the precise channels established by Congress, and has obtained the specific approval of the Secretary.

The tax resolution at issue here was submitted for Secretarial approval and approved in accordance with Merrion. As a delegate of the Secretary and part of the administrative review process, it is thus appropriate for the Board to address the constitutionality of the Pueblo's resolution. 7/

7/ In undertaking this analysis, the Board is mindful of Justice Frankfurter's admonition in Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444-45 (1940):

"The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

* * * * *

" * * * Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even occasional deviations over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this Court when state taxes come before it. At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate process of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

[4, 5] The Supreme Court has established the rules for determining if a challenged state tax impermissibly burdens interstate commerce. 8/ In Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), the Court held that a tax should be sustained against a Commerce Clause challenge if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." The Court has further instructed that "[t]he general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption. This burden is never met merely by showing a fair difference of opinion which as an original matter might be decided differently." (Footnotes omitted.) Norton Co. v. Department of Revenue, 340 U.S. 534, 537-38 (1951). See also New York ex rel. Cohn v. Graves, 300 U.S. 308, 316 (1937); Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 279 U.S. 306, 310 (1929). Thus, appellant here has the burden of showing that the challenged tax impermissibly burdens interstate commerce.

Appellant does not challenge the nexus between its activities and the taxing authority. It does, however, challenge each of the remaining three prongs of the Complete Auto Transit test. Appellant first argues that the tax is not fairly apportioned. In support of this argument appellant states that its tracks merely traverse the Pueblo, no loadings or unloadings occur

8/ In Merrion, the Court "note[d] that reviewing tribal action under the Interstate Commerce Clause is not without conceptual difficulties." 455 U.S. at 153. In its discussion the Court assumed that tribal taxes could be considered under the standards developed for reviewing state taxes. The Board will make the same assumption.

on the Pueblo, and no revenues are received directly from the Pueblo. Appellant states that if its entire system were taxed at the rate imposed by the Pueblo, the tax burden would be more than one-half of its net railway operating income. Appellant concludes that there is clearly no relationship between its activities on the Pueblo and the amount of tax.

In General Motors Corp. v. Washington, 377 U.S. 436, 440-41 (1964), the Court discussed the requirements for a tax to be constitutionally sound under the "fairly apportioned" prong of the Commerce Clause test:

A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. * * * As was said in Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940), "[t]he simple but controlling question is whether the state has given anything for which it can ask return."

As stated in Commonwealth Edison Co. v. Montana, 453 U.S. 609, 624-25 (1981), the tax must be "apportioned to activities occurring within the State."

Here, appellant concedes that its tracks cross the Pueblo. It furthermore admits that the tax is levied only against that portion of its tracks that are within the Pueblo's boundaries. The tax is, therefore, apportioned to that part of appellant's activities that occur within the Pueblo and thus to those activities that are made possible by the opportunities and

protections the Pueblo has provided. Appellant's argument as to the amount of tax it would have to pay if its entire system were taxed at the rate imposed by the Pueblo is irrelevant in determining whether the Pueblo has the power to impose this tax without constitutional objection. The Board holds that the tax is fairly apportioned.

Appellant next contends that the tax impermissibly discriminates against interstate commerce in that, on its face, it applies only to interstate commerce through the exclusion of retail commercial leaseholds. Thus, appellant argues that the tax "has effectively eliminated all intra-Reservation business from the tax, and thus made interstate commerce the sole subject of the tax. * * * Thus, since only non-retail businesses owned by non-members of the Tribe are subject to the tax, the tax discriminates against interstate commerce because it provides 'a direct commercial advantage to local business'" (Appellant's opening brief at 10).

The Supreme Court reviewed the discrimination prong of the interstate commerce test in Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 329 (1977):

No State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." [Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959). Other citations omitted.] The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade

which the Clause protects. Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951).

According to a December 11, 1984, memorandum from the Superintendent to the Area Director, the businesses affected by the tax are Mountain States Telephone and Telegraph Co., Continental Divide Electric Co-op, Inc., El Paso Natural Gas Co., Inc., Western Union, and appellant. These are all companies clearly involved in interstate commerce. Appellant's contention that these companies are not owned by tribal members is probably also correct.

However, appellant reasons that the tax on itself and these other companies provides a direct commercial advantage to local business. It is difficult to conceive that intra-Pueblo retail business is in competition with the interstate businesses affected by the tax, so that local businesses would receive a commercial advantage from the operation of the tax. Appellant makes no showing that any intra-Pueblo retail railroad is commercially advantaged by the tax. Appellant has failed to prove its contention that the tax discriminates against interstate commerce within the meaning of the third prong of the Complete Auto Transit test. 9/

Finally, appellant argues that the tax is not fairly related to the services provided by the Pueblo. Thus, appellant contends: "A 'just share' of the tax burden is precisely what is missing in this tax ordinance.

9/ There is also a reasonable basis for differentiating between retail and non-retail leaseholds, in that a retail enterprise may more easily be subjected to other forms of taxation, such as a sales or gross receipts tax, than can a non-retail business.

[Appellant] * * * is bearing the brunt of the leasehold tax while the beneficiaries of the governmental services of the Tribe, that is the members of the Tribe, escape taxation altogether" (Appellant's opening brief at 11).

The "fairly related" aspect of the Commerce Clause test was discussed in Commonwealth Edison, supra at 625-26:

The relevant inquiry under the fourth prong of the Complete Auto Transit test is not * * * the amount of the tax or the value of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong of the Complete Auto Transit test. Under this threshold test, the interstate business must have a substantial nexus with the State before any tax may be levied on it. Beyond that threshold requirement the fourth prong of the Complete Auto Transit test imposes the additional limitation that the measure of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just share of state tax burden," Western Live Stock v. Bureau of Revenue, 303 U.S., at 254. * * * As the Court explained in Wisconsin v. J. C Penney Co., supra, at 446 (emphasis added), "the incidence of the tax as well as its measure [must be] tied to the earnings which the State . . . has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes." [Citations and footnotes omitted; emphasis in original.]

The Court concluded at page 627 that "[w]hen a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of 'police and fire protection, the benefit of a trained work force, and "the advantages of a civilized society.'" Exxon Corp. v. Wisconsin Department of Revenue,

447 U.S., at 228, quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S., at 445.” 10/

The tax at issue here is assessed in proportion to appellant's presence on the Pueblo. Appellant's objections to the tax relate to its level and the fact that it is allegedly levied only against non-tribal members, who do not have access to the legislative process within the Pueblo. In regard to appellant's second point, it is in no different situation than any out-of-state taxpayer subjected to a state tax. The out-of-state status of a taxpayer does not, a fortiori, render a tax confiscatory, as appellant suggests.

As to the amount of the tax, the Supreme Court further stated in Commonwealth Edison Co., supra at 627-28:

The simple fact is that the appropriate level or rate of taxation is essentially a matter of legislative, and not judicial, resolution. * * * In essence, appellants ask this Court to prescribe

10/ The Court also noted that "states have considerable latitude in imposing general revenue taxes" under both the Due Process Clause and the Commerce Clause. 453 U.S. at 622-24. The tax at issue here is a general revenue tax. See also Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 522-23 (1937):

"A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government--that it exists primarily to provide for the common good. A corporation cannot object to the use of the taxes which it pays for the maintenance of schools because it has no children. This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him." (Citations omitted.)

a test for the validity of state taxes that would require state and federal courts, as a matter of federal constitutional law, to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate subjects of taxation. This we decline to do.

In the first place, it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in a wide variety of individual cases. But even apart from the difficulty of the judicial undertaking, the nature of the fact-finding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process. Under our federal system, the determination is to be made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests.

Thus, the level of the tax was a question for determination through the Pueblo's legislative process.

The fact that appellant does not believe that the tax level is fairly related to the services it receives from the Pueblo does not invalidate the tax under the forth prong of the Complete Auto Transit test. 11/

Accordingly, the Board holds that the Pueblo's tax does not violate the Commerce Clause. 12/

11/ In contrast, the Pueblo contends that the services required by appellant's presence on the Pueblo are very costly.

12/ Appellant concludes its Commerce Clause discussion with the statement that the Pueblo's tax impermissibly subjects it to multiple taxation by the Pueblo and the State of New Mexico. Appellant does not allege that it is being taxed by both jurisdictions. The Board has found that appellant has the requisite nexus with the Pueblo to be subjected to a tax by it. The Board is not the proper forum for challenging any tax that is or may be levied against appellant by the State of New Mexico because of appellant's presence on the Pueblo.

Appellant next argues that the tax violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This amendment states in pertinent part: "[N]or shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." Appellant contends that "[t]he tax is imposed only on leaseholds belonging to non-members of the Tribe. By basing the tax on the ethnicity of the owner of the property, the Tribe is making an unreasonable classification which is not rationally related to a legitimate tribal purpose" (Appellant's opening brief at 13).

[6] Appellant's argument overlooks the fact that Federal constitutional proscriptions applicable to the Federal and state governments do not restrict the exercise of governmental powers by an Indian tribe except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress. See e.g., Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980).

[7] The equal protection provisions of the Fifth and Fourteenth Amendments to the United States Constitution have been applied to Indian tribes through the Indian Civil Rights Act: "No Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws." 25 U.S.C. 1302(8). The determination of what constitutes a violation of the equal protection clause of the Indian Civil Rights Act is, however, a question for decision in tribal court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Furthermore, the meaning of equal protection may be modified in light of basic tribal cultural interests. Goundhog v. Keeler, 442 F.2d 674 (10 Cir. 1971); McCurdy v. Steele,

353 F. Supp. 629 (D. Utah 1973). This Board is, therefore, not the proper forum in which to challenge a tribal ordinance as being violative of equal protection of the laws. 13/

Finally appellant challenges the tribal ordinance under the 4-R Act, 49 U.S.C. § 11503.

This section states in pertinent part:

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

Initially, appellant makes no attempt to show that Indian tribes are subject to the restrictions imposed on states under the 4-R Act. 14/ However, assuming arguendo that the Pueblo is subject to this statute, there is no basis for appellant's claim that it is being taxed at a higher ratio than other commercial enterprises. As was previously shown, four companies besides appellant are subject to this tax legislation: Mountain States Telephone and Telegraph Co., Continental Divide Electric Co-op, Inc., El Paso Natural Gas

13/ The Board notes, however, that appellant's characterization of the tax is based on the ethnicity of the owner of the property is incorrect. The tax is clearly based on the type of commercial enterprise. There is also no showing that all retail enterprises on the Pueblo are owned by Indians.

14/ See note 8, supra,.

Co., Inc., and Western Union. These are the enterprises against which the ratio of the tax must be judged. Appellant has made no showing whatsoever that it is being taxed at a higher ratio to the true market value of its rail transportation property (assuming arguendo, again, that a leasehold qualifies as such property) than are the other companies subject to the tax. Accordingly, the Board holds that the Pueblo's tax does not violate the 4-R Act.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1. the January 15, 1985, decision of the Deputy Albuquerque Area Director approving appellant's tax ordinance is affirmed.

Jerry Muskrat
Administrative Judge

I concur:

Franklin D. Arness
Alternate Member